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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JHAMAL EDWARDS,

Defendant and Appellant.

E055959

(Super.Ct.No. RIF10000374)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed in part; reversed in part.

Gregory S. Cilli, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Warren Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Michael Jhamal Edwards guilty of first degree burglary (Pen. Code, § 459, count 1)¹ and active participation in a criminal street gang (§ 186.22, subd. (a), count 2). Defendant was thereafter sentenced to four years on count 1, plus a consecutive eight months on count 2, to run concurrently with his sentence from a Los Angeles County conviction.

Defendant contends that the evidence was insufficient to sustain the conviction for active gang participation because the evidence did not show that he acted in concert with another gang member in committing the burglary. In *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), the California Supreme Court held that section 186.22, subdivision (a), requires proof beyond a reasonable doubt that a defendant acted with one or more criminal street gang members in committing a felony. Here, there is no evidence to suggest that defendant acted in concert with another gang member. Accordingly, as we will discuss, the conviction for active gang participation must be reversed. Our conclusion that the conviction for active gang participation must be reversed for insufficient evidence renders moot defendant's first contention that section 654 precludes imposition of an unstayed sentence on the active gang participation count.

I

FACTUAL BACKGROUND

Sometime between 4:30 a.m. and 2:00 p.m. on May 21, 2009, Anthony Velasco's home in Moreno Valley was burglarized. Velasco was missing computers, jewelry, and

¹ All future statutory references are to the Penal Code unless otherwise stated.

gaming systems valued between \$15,000 and \$20,000. Police investigators discovered fingerprints matching defendant's fingerprints on a window screen and front door.

Defendant was arrested on September 3, 2009, as he was walking in a parking lot in Moreno Valley. After waiving his constitutional rights, defendant stated that he might have burglarized the house about two years ago but did not remember since he had committed many burglaries in the past for which he had not been arrested.

Riverside County Sheriff's Department Detective Lance Colmer testified as a gang expert. He had documented about 78 individuals with theft-related crimes from the Edgemont/Dorner Blocc gang and discussed several cases involving residential burglary in Moreno Valley that involved documented Edgemont/Dorner Blocc gang members. Detective Colmer noted that defendant had been convicted of burglary on two prior occasions and that defendant had pled guilty to committing a theft of a business to benefit a criminal street gang. He also stated that defendant had been contacted by police while associating with several known Edgemont/Dorner Blocc gang members on six occasions, and on two separate occasions during gang classification at the county jail defendant admitted to being a member of the Edgemont/Dorner Blocc gang. The detective opined that defendant was a member of the Edgemont/Dorner Blocc gang with the gang moniker "Lil K-Dogg" as of May 2009. He also concluded that the burglary was committed for the benefit of, in association with or by direction of members of the Edgemont/Dorner Blocc gang in order to obtain money and goods for themselves or to buy guns.

II

DISCUSSION

Defendant contends that the evidence was insufficient to sustain the conviction for active participation in a criminal street gang because the evidence did not show that he acted in concert with another gang member in committing the May 2009 residential burglary. The People agree. We also agree.

Section 186.22, subdivision (a), provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

Appellate courts were divided as to whether a gang member, acting alone, could be found to have willfully promoted, furthered or assisted in felonious conduct of members of the gang of which he or she was a member. (*Rodriguez, supra*, 55 Cal.4th at p. 1128.) However, *Rodriguez* clarified that division among the appellate courts.

In *Rodriguez*, the defendant acted alone in committing an attempted robbery. (*Rodriguez, supra*, 55 Cal.4th at p. 1128.) He was convicted of attempted robbery and active participation in a criminal street gang under section 186.22, subdivision (a). (*Rodriguez, supra*, at p. 1129.) The issue in *Rodriguez*, like the issue raised by defendant in the present case, was whether the third element of the crime described in section 186.22, subdivision (a)—willfully promoting, furthering, or assisting in any felonious

criminal conduct by members of the defendant’s gang—can be satisfied by felonious criminal conduct committed by the defendant acting alone. (*Rodriguez, supra*, at p. 1129.) The court held that it does not, finding that a conviction for active participation in a criminal street gang required proof that the defendant acted with at least one other gang member in committing the underlying offense. (*Id.* at pp. 1128-1129, 1132-1133, 1137-1139.) The court explained that “section 186.22[, subdivision] (a) reflects the Legislature’s carefully structured endeavor to punish active [gang] participants for commission of criminal acts done *collectively* with gang members.” (*Rodriguez*, at p. 1139, italics in original.) A defendant who acts alone does not violate section 186.22, subdivision (a). (*Ibid.*)

Defendant correctly points out that there is no evidence that he acted with anyone else in committing the burglary in this case. The People agree that there is no evidence to suggest that defendant acted in concert with other gang members. Because defendant acted alone in committing the burglary—the only crime the prosecution relied on to support the third element of the gang participation count—there is insufficient evidence to support the conviction on that count. Accordingly, defendant’s conviction for active participation in a criminal street gang must be reversed for insufficient evidence as a matter of law.

III

DISPOSITION

The judgment of conviction on count 2 for active participation in a criminal street gang is reversed. The trial court is directed to modify defendant’s sentence accordingly

and deliver a certified copy of an amended minute order and amended abstract of judgment, each reflecting the modification of the sentence, to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.